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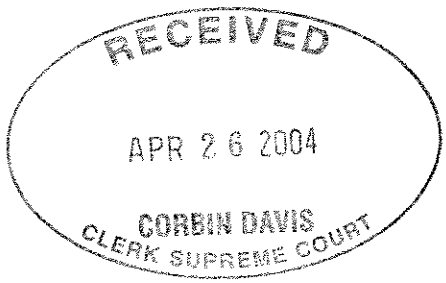

Mr. Corbin Davis
Clerk, Michigan Supreme Court
P.O. Box 30052
Lansing, MI 48909

Re: Comments on Proposed Rule Changes
Administrative File No. 2003-4

Dear Mr. Davis:

Allow me to add my voice to what must already be a strong chorus of opposition to many of the proposed changes, particularly those which would unambiguously deny due process to defendants, guilty or innocent, and would more than likely encourage, rather than discourage, excessive litigation. The Court ought not, in my humble opinion, be in the business of making substantive – as opposed to procedural – regulations, especially where they trample necessary safeguards which protect the innocent as much as the "guilty" and disregard Michigan as well as federal constitutional prerogatives.

These regulations, which clearly reflect an unambiguous prosecutorial leaning, will not, in the long run, help promote justice, but rather encourage disrespect, disenchantment and alienation on the part of citizens. Unnecessary draconian restricting of potentially factually innocent people's ability to litigate legitimate post-trial claims to the Michigan court system cannot fail to promote anything other than frustration in its failed mission to streamline and avoid irresponsible filings. So many of the proposals do little more than supplement prosecutors' convenience without providing true improvements to the proper administration of justice, while at the same time open the door wide to egregious abuses.

As a practitioner for over thirty-six years – both as a prosecutor and defense attorney – I simply cannot imagine a need to make convictions – justified or unjustified – more "final" just for the sake of some vague, if understandable, sense of need for finality on the part of victims, prosecutors or even the court system. This is particularly so in this day and age where everyday we discovery more and more instances of prosecutorial misconduct, police fabrications, forced or false confessions, factually innocent people

released from prison because of DNA but only after years and often decades behind bars for crimes they did not commit. Prosecutorial standards of proof should be increased if anything, not reduced, given the State's virtually unbridled discretion of whom and what to charge, the State's unparalleled and unlimited resources, and the disastrous impact of prosecution – much less conviction – on a citizen's reputation, career, family, finances, freedom and future.

I submit that the Court should, if anything, be more concerned with those potentials, as we learn more and more almost every day of the abuses that have been inherent in our system of justice, the abuses which have flourished and the claims of false confessions, police brutality and corruption which, until very, very recently were all but completely ignored.

Only the system's own processes have provided recourse for those who have been disserved, and now the Court seeks to even further restrict innocent people's access to that recourse in order to avoid the abusive and dishonest challenges. Not a single innocent person – factually or procedurally – should have to suffer the ignominy of a false conviction or the perverse and vicious reality of a prison in which he or she does not belong, regardless of when the truth is discovered. A grossly ineffective attorney's failures ought not be discounted blandly and blithely by reverting to the old saw that a defendant is only entitled to a reasonable defense, not a perfect one, or that time for discovery of the incompetence – a wholly arbitrary line – has passed.

Instead, legitimate motions for new trial ought to be able to be filed when newly discovered evidence is discovered, not when it is discovered only within the arbitrary time limitation short enough today, let alone so short as that to which the Court now proposes to reduce it; petitions for habeas corpus review should be limited only by the lack of evidence or lack of ability to prove that terrible wrongs have been committed – failure to provide to the defense evidence of innocence, evidence of jailhouse snitch's rewards for his infamy and reasons for him to want to lie, perjury of police witnesses or lab technicians, bias of a judge or jurors – these and a whole plethora of injustices which need to be corrected the very minute they are discovered, subjected to reasonable and objective scrutiny and ruled upon by judges elected by the people of this state to insure justice is done right, not just quickly for the sake of speed and some misguided sense of "closure." As a government, we can ill afford to reduce a person's ability to prove innocence to arbitrary and unreasonably rigid and largely unnecessary time frames only.

The University of Michigan has conducted an exhaustive and comprehensive study

of post-conviction exonerations over the last decade and one-half which reveal that it is more than likely that there are thousands of innocent people in prison today who have not been able to prove their innocence because their case had no DNA evidence to be tested today. In the same sense, the former governor of the State of Illinois, a death penalty proponent for his entire political career, was moved by unambiguous proof of a faulty system which put so many innocents on death row (more were exonerated in a ten-year period than were executed).

The recent and undeniable revelations of systemic corruption in scientific laboratories all over the country – from the F.B.I.'s own vaulted Washington, D.C. lab, to Oklahoma City's and Virginia's State Police Forensic labs – and indictments, both actual as well as by way of public condemnation from prosecutors and judges alike (not to mention the lonely defense bar's voice, all to often in the wilderness) of the personnel and leadership from all of them – to name only three examples, make it impossible to maintain the kind of supreme confidence in the "science" of law enforcement which previously gave rise to the now abused zeal to have "finality" justify the old time limitations on appeals and habeas actions, and unambiguously render insupportable any effort to further restrict the availability of such post-trial processes.

This Court must consider, based on these and other studies and equally breathtaking revelations over just the last 5 years, that the number of innocent people in prison – or even with just an unjustified conviction which ruins most convicts' lives through denial of student loans, employment by government and private industry, rejection from universities, refusal of various licenses (professional, driving, etc.) – is staggering. Now is anything but time for more restrictions.

Moreover, are the trial courts of this state really so burdened and busy that they are unable to handle the traffic of legitimate motions for new trial and habeas now because of a few frivolous ones? Just how much time does the Court suppose that trial courts spend on such matters, frivolous or otherwise? It cannot be so great that justice and the appearance of justice (which is equally important) ought be endangered for so little gain.

In the same way, now is anything but the time to make less reliable any aspect of the criminal justice system. The proposal to allow an encroachment of the bedrock constitutional right full confrontation of every individual in this Country by allowing off-site electronically transmitted images of witnesses (Proposed Rule 6.006), clearly violates the United States Supreme Court's landmark and all but unanimous decision in *Crawford* v *Washington*. Moreover, all such a rule could do is serve to diminish jurors' crucial ability

to assess credibility in part through body language and close examination of a witness' hands and body as he or she testifies; how can that possibly enhance justice?

The proposed rule excluding indigent defendants' right to transcripts until trial [6.113(D)] might in theory save a few pennies in the overall court budget, but at the cost of an enormous increase in federal habeas proceedings for denial of due process (in giving adequate time to prepare for trial) and equal protection (because those disadvantaged will be only those already economically disadvantaged). It would save nothing to peak of in the short term, would make the Court and judicial system appear to the public as small and mean, and could not help but result in vastly increased costs long term.

With regard to the proposed changes to Rule 6.201 further limiting the documents which the State is required to share, it is difficult to imagine the anyone sincerely believes there will be any greater protection or security for witnesses than there is now. Either the defendant knows his accusers because they are neighbors, "friends," or co-conspirators, or he does not know them. Their addresses (even of relatives) is not provided now, ever; witnesses are protected now wherever there has ever been a credible threat or even prospect of a threat; and, finally, nearly all defendants are so intent on getting out of trouble that they are unlikely to understand the difference between the witness writing a statement and the witness testifying in court.

Once the crucial witnesses have testified at the exam, the cat is certainly out of the proverbial bag anyway, in those rare instances where the defendant does not already know who is accusing him or her; those defendants who genuinely believe the accusations are false cling to the expectation that the system will result in the truth being told. So what have they to gain from intimidating witnesses, and how will the rule make intimidation less likely when most – if not virtually all – of at least the guilty know their accusers anyway?

And again, even the Federal Government almost never enforces – strictly if at all – its Jencks Act, Title 18 U.S.C. §3500 (which is presumably at the root of this proposed rule change) and in virtually every case every witness and their testimony are provided to the defendant well in advance of the trial – if not immediately after arraignment – despite the Act. United States Attorneys around the country have long since discovered that, in all but a very, very few particularly violent cases, there is no benefit to be gained from enforcement of the Act, and indeed enforcement has often had the opposite effect by discouraging plea offers from defendants who are not fully aware of the extent of their troubles where, for example, they do not know that a co-conspirator has decided to cooperate.

Similarly, the proposed change to the 180-Day Rule notification would exclusively leave in the hands of the Department of Corrections the initiation of the process, with no recourse whatsoever for negligence, slothfulness or outright malevolence. How could anyone think that was fair? At the very least, if the sole trigger is to be the DOC, then there should certainly be a restricted time limit, say 30 days at most, for the Department to act and, upon failure to act for any reason whatsoever, the 180 days would automatically begin to run. Then at the very least, it is not hard to imagine that there would be many mistakes.

As well, were the proposal for Rule 6.201(A)(5) adopted, the character, admissibility and reliability of documents, photos and the like would not be definitively addressed until trial, by which time jurors, judges, witnesses and lawyers would have been subjected to entirely unnecessary lost time, money would be wasted on expert witness costs of travel, blocking out time to be available for trial, and defendants' would have one less incentive to see reality and recognize that a guilty plea is in order well enough in advance of trial to actually save time and money and actually tend to streamline dockets.

Trial by ambush – which is what these two proposed changes will encourage – should at all costs be avoided, since it causes far greater scrutiny by appellate courts (particularly the federal courts) of the trial to establish overall "fairness" of a proceeding. What exactly is to be gained by such rules? It is often the certainty of documentary evidence that tips the balance for a defendant in favor of pleading. As well, how many witnesses have been attacked in this (or any other) state by defendants who only found out who they were by reviewing the discovery?

The Court should not be swayed by real or imagined fears about what "might" happen, only what *has* happened and whether rule changes can hold the reasonable prospect of fixing the problem. If a particular defendant is so dangerous that he poses a real threat to witnesses, he is either not on bond, should not be, or should be in an institution in any event. If giving over original documents for examination in advance of trial can encourage pleas, what's the harm?

The proposed Rule 6.414(H) which would allow instructions before argument would give the prosecution such an absurdly unfair advantage as to be incomprehensible. The State already has the final word before the instructions, but at least the "impartiality" of the judge's instructions are the last thing jurors hear before they enter the jury room. Such a proposal is tantamount to allowing judges to comment on the evidence from the bench, a system that is fraught with innumerable dangers and with no history of any greater fairness resulting. It is one of the things that distinguish this country from every other in the world.

That part of the system surely cannot be said to be broken in any way; why damage the process by trying to fix what is not broken? Where can there be fairness there? Is the Court suggesting that it is currently "unfair" for the instructions to come last, or somehow "too fair" for the defense? If not, why touch it?

At all costs, I urge extreme caution and most cautious examination of every aspect and unexpected consequences of each of the proposed changes long before decisions are made to appease one or another side of the legal equation. Unfair advantage has never been the hallmark of our Constitution, whatever the potential benefits to docket control. If more judges are needed to insure fairness, more prosecutors, more defense lawyers, then that is what we in this profession and in government owe to the public.

Thank you for taking the time to consider these comments.

Yours very truly,

JAMES W. BURDICK

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